IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1117

DONALD GILBERT SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I 6

II 10

III 14

CONCLUSION 19

Appendices:

A Opinion of Sixth Circuit Court of Appeals of August 11, 1978 ..... 1a

B Order of Sixth Circuit Court of Appeals denying Motion for Rehearing of December 15, 1978 ..... 1b

C Journal Entry of Judgment and Sentence of the United States District Court for the Northern District of Ohio, Eastern Division, of April 25, 1977 ..... 1c

D Letter from United States Attorney Erickson to the Honorable Carl Rubin of May 23, 1978 ..... 1d

E Jury Instruction of the Trial Court on intent and entrapment 1e

F Order of the Sixth Circuit Court of Appeals in Case Number 76-1560, vacating sentence on Petitioner's original plea of guilty, of November 22, 1976 ..... 1f

TABLE OF AUTHORITIES ii

TABLE OF AUTHORITIES

Benes v. *United States*,
276 F.2d 99 (6th Cir. 1960) 16

Blackledge v. *Perry*,
417 U.S. 21 (1974) 6,7,8

Cooper v. *United States*,
357 F.2d 247 (D.C.Cir. 1966) 16

Monroe v. *United States*,
424 F.2d 243 (10th Cir. 1970) 16

Morris v. *United States*,
326 F.2d 192 (9th Cir. 1963) 16

North Carolina v. *Pearce*,
395 U.S. 711 (1969) 6,7,8,9

Palermo v. *Warden, Green Haven State Prison*,
545 F.2d 286 (2d Cir. 1976) 12

Petition of Geisser,
554 F.2d 698 (5th Cir. 1977) 13

Santobello v. *New York*,
404 U.S. 257 (1971) 11,12,13

Simpson v. *Rice*,
395 U.S. 711 (1969) 7

United States v. *Brown*,
500 F.2d 375 (4th Cir. 1975) 12

United States v. *Durbin*,
542 F.2d 486 (8th Cir. 1976) 8

United States v. *Garcia*,
519 F.2d 1343 (9th Cir. 1975) 11

United States v. *Gerard*,
491 F.2d 1300 (9th Cir. 1974) 8

United States v. *Grandinetti*,
564 F.2d 723 (5th Cir. 1977) 11

United States v. *Hammerman*,
528 F.2d 326 (4th Cir. 1975) 11

United States v. *McCord*,
509 F.2d 891 (7th Cir. 1975) 17,18

United States v. *Nani*,
218 F.2d 730 (2d Cir. 1955) 16

United States v. *Naylor*,
566 F.2d 942 (5th Cir. 1978) 19

United States v. *Preciado-Gomez*,
529 F.2d 935 (9th Cir. 1976) 8

United States v. *Ruesga-Martinez*,
534 F.2d 1367 (9th Cir. 1976) 8

United States v. *Shameia*, 464 F.2d 629 (6th Cir. 1972) ... 16

United States v. *Walker*,
346 F.2d 428 (4th Cir. 1965) 9

Walsh v. *United States*,
374 F.2d 42 (9th Cir. 1967) 9

Ward v. *State*,
444 P.2d 252 (Okla. Cr.App. 1968) 7

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on August 11, 1978.

OPINIONS BELOW

There was no opinion in the trial court, the United States District Court for the Northern District of Ohio, Eastern Division. The opinion of the Sixth Circuit Court of Appeals

affirming the judgment of the trial court has not been reported; it is printed as Appendix A hereto. The order of the Sixth Circuit Court of Appeals overruling the Motion for Rehearing is printed as Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit (Appendix A) was entered on August 11, 1978. A timely petition for rehearing was denied on December 15, 1978. (Appendix B). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. section 1254 (1).

QUESTIONS PRESENTED

1. Whether increasing the sentence of Petitioner from four years imprisonment and three years of special parole to fifteen years imprisonment and twelve years of special parole subsequent to a successful prosecution of his right to appeal an improper original sentence violates due process of law as such a harsher sentence raises the fear of vindictiveness that creates a chilling effect upon the right to appeal.
2. Whether Petitioner is entitled to specific performance of a plea bargain after he has been incarcerated for nearly two years pursuant to the plea obtained.
3. Whether a criminal defendant is denied due process of law when a trial court instructs a jury in a clumsy and confusing manner on the issue of intent and then sua sponte imposes upon the same defendant through ad-

ditional instructions a defense of entrapment when such a defense has been repudiated by the defendant and is in direct conflict with his actual defense as such an instruction has the effect of misleading the jury and reducing the Government's burden to prove each and every element of the criminal offense beyond a reasonable doubt.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On December 9, 1974 Petitioner entered a plea of guilty to one count of a six count indictment charging violations of 21 U.S.C. Sections 841 and 846 and Section 841 (a)(1). This plea was entered pursuant to a plea bargain in which the Petitioner was assured by both the United States Attorney and the District Court that the maximum sentences to which Petitioner would be subjected would be five years. On February 12, 1975 the remaining five counts were dismissed

and Petitioner was sentenced on the one count to which he had pled guilty. After examination of a thorough pre-sentence investigation report which detailed each and every fact that led to the six count indictment, the District Court sentenced Petitioner to four years imprisonment and three years of special parole. Petitioner successfully appealed this sentence as it failed to conform to other terms of the plea bargain as explained to him. The Court of Appeals for the Sixth Circuit ordered

> that this cause be and it hereby is remanded to the District Court with instructions to vacate the sentence imposed, to set aside the plea of guilty entered by appellant as hereinabove set forth, and to enter a new plea to the within charge. Order 76-1560, November 22, 1976. Appendix F.

Petitioner had sought only to vacate his sentence and to deal knowingly and voluntarily with the single charge of which he stood convicted. The Court of Appeals recognized this requested relief in vacating the sentence and permitting new activity only as to the "within charge." At the time of this order Petitioner had already been incarcerated for nearly two years.

The events that followed this order, culminating in the Petitioner being sentenced to fifteen years imprisonment and twelve years of special parole, establish a pattern of vindictiveness clear enough to have a chilling effect on any observer's right to appeal. In reality it would have a freezing effect on this protected right to an individual in a similar situation. Petitioner was unlawfully detained in prison for twenty-seven days after the mandate of the Court of Appeals went into effect. During that time the government obtained a new six count indictment identical to the original indictment and when Petitioner was released he was ordered to plead to

all six counts of the new indictment and the charge upon which he had been sentenced was dismissed. Petitioner was tried by a Jury on all six counts and found guilty on all six counts on March 30, 1977. He was then sentenced to the much harsher penalty notwithstanding the fact that all of the identical information with respect to all six counts had been presented to the District Court at Petitioner's original sentencing on February 12, 1975.

During the course of the trial the factual basis upon which the indictments were obtained was strongly challenged. The issue of credibility and Petitioner's involvement in the activity alleged was raised when all of the Government's witnesses claimed he was not involved in the said activity. The government was thus forced to convince the jury of Petitioner's involvement by impeaching its own witnesses. In effect it was clear that Petitioner's sole defense was that he did not engage in the alleged activity. Notwithstanding this fact the District Court instructed the jury on the entrapment defense thus undermining his sole defense and creating the impression of an admission to the activity so vigorously denied. That the entrapment defense was not appropriate is admitted by the United States Attorney in both the Respondent's Brief in the Court below and in a letter responding to an inquiry by the Honorable Carl B. Rubin (See Appendix D). In addition to this erroneous and unrequested instruction the District Court further instructed the jury on the issue of intent in a manner that has been characterized by the Circuit Court as "clumsy and confusing". *United States v. Smith,* Case No. 77-5281 at pages 5 and 6 (6th Circuit 1978) (The opinion below, Appendix A).

Thus having his defense confused and undermined by the erroneous instructions, the Petitioner now faces a sentence

increased by eleven years of imprisonment and nine years of special parole over his original sentence because of the single fact that he exercised his right to appeal what the Circuit Court has already determined was an improper sentence.

REASONS FOR GRANTING THE WRIT

I.

IT IS A GROSS VIOLATION OF DUE PROCESS OF LAW AND IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT, *NORTH CAROLINA V. PEARCE*, 395 U.S. 711 (1969), *BLACKLEDGE V. PERRY*, 417 U.S. 21 (1974), TO SUBJECT AN INDIVIDUAL TO AN INCREASED SENTENCE OF AN ADDITIONAL ELEVEN YEARS IMPRISONMENT AND NINE YEARS OF SPECIAL PAROLE AFTER THE RIGHT TO APPEAL THE ORIGINAL SENTENCE HAS BEEN SUCCESSFULLY PROSECUTED BECAUSE TO IMPOSE SUCH A HARSHER SENTENCE RAISES THE FEAR OF VINDICTIVENESS THAT CREATES A CHILLING EFFECT UPON THE RIGHT TO APPEAL.

This Court has categorically stated that vindictive harsher punishments, or actions which raise the fear of such vindictiveness upon successful attack of a conviction, are unconstitutional. *North Carolina v. Pearce*, 395 U.S. 711 (1969). Notwithstanding this fact Petitioner in the case at bar is facing a current sentence remarkable for its being a far

harsher sentence than that originally imposed. It is important to note that there is absolutely no objective data appearing in the record to support the legitimacy of such a harsh sentence thus creating a situation that is a direct violation of the dictates of this Court.

A consideration of constitutional dimension is raised by Petitioner's new sentence being significantly increased and harsher than his original sentence. In *Pearce* and *Simpson v. Rice*, 395 U.S. 711 (1969), this Court held that fear of vindictiveness through higher sentence after a successful appeal violated due process. Higher sentence could only be imposed upon an objective and stated finding of the judge of identifiable *conduct* of the defendant occurring *after* the time of original sentencing which justified a greater penalty. No such post-sentencing conduct was identified or utilized in the case at bar. Where a State has bound itself by electing to accept a guilty plea to less than the full indictment, it cannot retry on the original indictment and then impose a greater statutory penalty. *Ward v. State*, 444 P.2d 252 (Okla. Cr.App. 1968). The greater penalty exacted is a direct result of the successful appeal and is violative of due process.

In *Blackledge v. Perry*, 417 U.S. 21 (1974), the Supreme Court noted that prosecutorial actions which create the fear of vindictiveness violate due process under the principles of *Pearce*. Therein, a trial de novo as of right was given to misdemeanants convicted in a lower court. The defendant exercised his right; the State obtained a felony indictment in the same case prior to the new trial. The Court noted the due process violation in the potential for vindictiveness in the prosecutor. If the State can discourage following a remedy by "upping the ante," then a right is chilled, and malice and bad faith are unimportant, for the *fear* of harsher penalty is the

wrong. No justification for trying Petitioner on counts the Government elected to drop exists. Absolutely no conduct of Petitioner after his original sentence was noted to justify a harsher sentence. It is important to note that the Government in its brief in the Court below in an attempt to justify the harsher sentence merely stated that the Court became aware of facts occurring before the original sentence that might have come to the Court's attention during the trial of this cause. Whatever these facts might be they are not ever set forth in the record.

As noted in *United States v. Ruesga-Martinez,* 534 F.2d 1367, 1369, (9th Cir. 1976)

> "*Pearce* and *Blackledge* therefore establish, beyond doubt, that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges are not motivated by a vindictive motive."

In *United States v. Preciado-Gomez,* 529 F.2d 935, 936, (9th Cir. 1976), it was noted that a retrial "seeking a heavier penalty for the same acts as originally charged is inherently suspect" as being vindictive. The suspicion is created when an individual is subjected to harsher treatment for exercising a procedural right. (See also *United States v. Gerard,* 491 F.2d 1300 (9th Cir. 1974).

United States v. Durbin, 542 F.2d 486 (8th Cir. 1976), recognizes the distinction between vacating sentence alone and vacating conviction as well. When a defendant seeks only to have a legal sentence imposed, an increase of punishment violates double jeopardy protections by imposing a multiple punishment. The chilling of the exercise of a right to a legally imposed sentence would occur unless the

maximum allowable resentence were the original sentence. Only objective criteria of subsequent acts justifying a more severe sentence would support an increased punishment under *North Carolina v. Pearce, supra.*

Similarly, in *Walsh v. United States,* 374 F.2d 42 (9th Cir. 1967), a sentence imposed under faulty procedures was vacated. At sentencing, the court had temporarily imposed the maximum term (20 years) pending reports. After receiving reports, the court imposed sentence of only 12 years, in the absence of defendant and counsel. This sentence was vacated. The court reinstated the 20 year sentence. The Court of Appeals reversed, holding that the first sentence of 12 years, even though wrongly imposed and therefore successfully attacked, was the *maximum* allowable sentence. Likewise, although wrongly imposed, Petitioner's original four year imprisonment, three year special parole sentence constitutes the maximum punishment he may constitutionally receive, under the facts and circumstances of the present case. In *United States v. Walker,* 346 F.2d 428 (4th Cir. 1965), the defendant was unlawfully sentenced. He sought to vacate the sentence and to receive a valid sentence. The court held he could only receive at most his original punishment, especially since he had no desire to reopen his entire case. In the case at bar the identical situation exists, since Petitioner sought to challenge only his sentence. *Walker,* in dictum, further states that even if vacated conviction has been sought, no greater sentence could be imposed on reconviction without conditioning the exercise of a constitutional right impermissibly. Petitioner submits that the harsher penalty imposed subsequent to his requested relief from an improper sentence is a constitutionally impermissible violation of due process of law.

Donald Gilbert Smith has reaped the full punishment for pursuing his right to appeal even though he never voluntarily abandoned his desire to subject himself to a fair and understood sentencing upon his original plea.

II.

THE DECISIONS OF THIS COURT DICTATE THAT SPECIFIC PERFORMANCE OF A PLEA BARGAIN BE ENFORCED AFTER PETITIONER HAS SERVED NEARLY TWO YEARS OF IMPRISONMENT PURSUANT TO THE PLEA OBTAINED.

The Double Jeopardy Clause is a protection both against dual prosecution and dual punishment. Once a defendant enters a plea of guilty, he has placed himself in jeopardy. By waiving myriad constitutional rights, the defendant obtains a promise of action by the United States Attorney. In the case at bar, Petitioner pled guilty in exchange for a promise of a five year sentence. He received a four year imprisonment, three year special parole sentence, which he successfully attacked collaterally for its nonconformity to the bargain he had struck. Petitioner was addressing the performance of the original agreement, and thus limiting the jeopardy in which he placed himself. By reindicting and failing once again to meet the terms of the original bargain struck with Petitioner, the Government effectively placed him twice in jeopardy, and punished him more severely.

Petitioner submits that under the facts and circumstances, he is entitled to specific performance of his original plea

bargain, according to *Santobello v. New York*, 404 U.S. 257 (1971). In *Santobello*, the defendant sought to withdraw his plea of guilty as well as to vacate his sentence thereon as having been imposed in violation of his bargain with the State. The Court held that the appropriate relief was to be fit to the circumstances of the case, either "that there be a specific performance of the agreement on the plea . . . or whether . . . the circumstances require granting the relief sought by petitioner, *i.e.*, the opportunity to withdraw his plea of guilty." *Id.* at 262-263. Thus, the *minimum* remedy appropriate in unkept plea bargains is specific performance of the promise; upon request of *the defendant* and if circumstances require it in the interests of justice, withdrawal of the plea may be the only adequate remedy. As Justice Douglas explicated this position in his concurring opinion, due process would be served by specific performance, or withdrawal if specific performance would be inadequate.

> In choosing a remedy, however, a court ought to accord a defendant's preference considrable, if not controlling, weight inasmuch as the fundamental rights flouted by the prosecutor's breach of a plea bargain are those of the defendant, not of the State. *Id.* at 267.

It is worthy of note that the opinion of Justice Marshall concurring in part and dissenting in part also emphasizes the weight of a defendant's preference.

In fashioning remedies under the principles of *Santobello*, the federal courts have noted initially that the remedy must give the successful appellant his reasonably due relief. Often, that relief is remand for resentencing, before a different judge, with the prosecutor specifically performing the original bargain. *United States v. Grandinetti*, 564 F.2d 723 (5th Cir. 1977); *United States v. Hammerman*, 528 F.2d 326 (4th Cir. 1975); *United States v. Garcia*, 519 F.2d

1343 (9th Cir. 1975). Especially where a defendant requests specific performance, no other remedy is appropriate to do justice.

In the case at bar, further considerations mandate giving Petitioner the opportunity for specific performance. He had already served a large portion of the sentence agreed to upon his initial bargain. In such a case, the clear operation of prejudice against the Petitioner unless the original agreement is enforced is undebatable. Thus, where a defendant sought specific performance of his bargain, the Fourth Circuit has unequivocally held:

> Defendant does not seek to withdraw his guilty plea but only asks the lesser relief of "specific performance" of the plea bargain. We thus have no need to consider a choice of remedies. In the light of defendant's position, we conclude that a remand for resentencing before a different district judge, after full compliance with the terms of the plea bargain, follows *a fortiori* from *Santobello. United States v. Brown,* 500 F.2d 375, 378 (4th Cir. 1975).

When that specific performance is sought after a defendant has served the sentence originally agreed upon, its being granted is even more essential, because a defendant who relies on promises "has a right to have those promises fulfilled." *Palermo v. Warden, Green Haven State Prison,* 545 F.2d 286, 296 (2nd Cir. 1976). Where a defendant has been prejudiced by serving time in prison, a remand for which he is given only the opportunity to withdraw his plea is meaningless; it is certainly no remedy: "Specific performance of the plea bargain would constitute the only meaningful relief in the context of this case." *Id.* Surely it is no relief to force Petitioner to enter a not guilty plea to a charge upon which he has served over 22 months in prison

and then to try Petitioner and sentence him significantly more harshly than his bargain *or* actual original sentence.

Dealing with a similar problem, the Fifth Circuit noted that when a defendant has already felt the effect of the Government's breach of its agreement, by starting to serve a sentence, a fundamentally different problem of remedy is raised than was raised in *Santobello,* where the defendant had not yet started to serve his sentence. In the former case, the alternative of resentencing was recognized not to be a good remedy, for prejudice by serving had changed what was reasonably due to the Petitioner. "An opportunity to replead seems superficial and unrealistic in view of [Petitioner's] long confinement. Specific performance may well be the only way out to keep the bargain." *Petition of Geisser,* 554 F.2d 698, 706 (5th Cir. 1977).

The remedy of relief from a sentence imposed illegally by virtue of a violated plea bargain agreement is to perfect defendants and their rights. To utilize a successful attack as an opportunity to reindict a defendant and impose a severer sentence upon conviction is a travesty of justice, and flies in the face of the protections guaranteed by *Santobello:* "The fundamental right flouted by the prosecutor's breach of a plea bargain are those of the defendant, not of the State." 404 U.S. at 267 (Douglas, J., concurring). Petitioner deserves the opportunity for specific performance of his plea bargain as the relief adequately protective of his rights.

III.

COURT IMPOSITION OF A DEFENSE CONTRADICTORY TO A CRIMINAL DEFENDANT'S ACTUAL DEFENSE, AND WHICH ADMITS TO ACTIVITIES WHICH THE DEFENDANT SOUGHT TO HAVE THE GOVERNMENT PROVE BEYOND A REASONABLE DOUBT, SO GRAVELY MISLEADS THE JURY AND UNDERCUTS A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS TO REQUIRE THIS COURT'S CONDEMNATION.

Petitioner maintained throughout his trial that he had not engaged in the activities basing the criminal charges he faced. The trial court, after instructing the jury on the element of criminal intent in a manner characterized by the Court of Appeals as "clumsy" and "confusing", proceeded to further reduce the Government's burden of proof by instructing on the defense of entrapment. This defense was never raised by Petitioner; the instruction was given over his objection. The clear effect of the instruction was to characterize Petitioner's defense as admitting to the activities alleged, but claiming government inducement to relieve himself of criminal responsibility. The trial court thereby misstated Petitioner's defense and contradicted his actual defense in a highly prejudicial manner. Several Circuit Courts of Appeal have ruled that denying a defendant his defense, or misstating it so as to reduce its effectiveness is reversible error. This Court should rule that the position of the Sixth Circuit, allowing direct contradiction of a defendant's stance before the jury, infringes Fifth Amendment guarantees of due process as well as calling for the exercise of this Court's supervisory

powers to insure justice and equity in the federal criminal justice system.

Critical factual issues in Petitioner's trial rested upon credibility. The government's case-in-chief consisted primarily of impeaching its own witnesses. Petitioner steadfastly denied participation in the alleged activities. Summarizing for the jury, Petitioner's counsel attacked the credibility of the chief government witness's prior statements implicating the Petitioner as false accusations made to enhance her own position with the authorities through appearing to cooperate. The United States Attorney himself so interpreted these remarks:

> During his summation, defense counsel alluded to the fact that the Carrs (the government's primary witnesses) "felt that if they cooperated with the Government, it would go easier for them" (Tr. 887); that appellant was "set [ ] up" by Kathy Carr (Tr. 892); and that "one of the dangers inherent in . . . the domino theory . . . where you get somebody—maybe it's done through an informer—get somebody else . . . is that somebody, to protect himself and help himself, might do things that he shouldn't do. (Tr. 896).
>
> While these remarks might be construed as consistent with an entrapment defense when viewed in isolation, when placed in context the remarks were clearly part of appellant's defense that he had nothing to do with the narcotics transactions charged in the indictment and that Kathy Carr's testimony on this point was fabricated. (Appendix D; Letter from Robert J. Erickson to the Honorable Carl B. Rubin, May 23, 1978).

Nevertheless, the trial Court interpreted this argument as raising entrapment, and over Petitioner's objection, instructed the jury that defendant had raised this defense. Entrapment requires admission of all acting elements of a

criminal offense. *United States v. Shameia,* 464 F.2d 629 (6th Cir. 1972). It therefore relieves the Government from providing the very activities Petitioner denied engaging in. *See Monroe v. United States,* 424 F.2d 243 (10th Cir. 1970). The court's instruction misled the jury into the ability to infer or presume Petitioner's involvement, thus undermining Petitioner's steadfastly maintained defense of uninvolvement.

Petitioner's involvement was a close issue, resting on credibility determination. Meticulous precision in instructing the jury is required in such circumstances, and a misleading instruction necessarily inferring Petitioner's admission to engaging in the subject transactions falls far short of this standard. *Cooper v. United States,* 357 F.2d 247 (D.C.Cir. 1966). When the defense theory of no intent to evade taxes, bolstered by the "stupidity" of keeping records had there been intent, was misstated as defendant pleading ignorance caused the evasion, the contrast created reversible error. *Benes v. United States,* 276 F.2d 99 (6th Cir. 1960). How much more prejudicial is the instant misstatement, which actually contradicted Petitioner's position.

The Second Circuit has held that a court must adequately instruct on a theory of defense. *United States v. Nani,* 218 F.2d 730 (2nd Cir. 1955) (failure to understand and charge on third person conveying government agent's message to establish entrapment). Jury instructions without basis in evidence are misleading and prejudicial, permitting unfounded jury findings. *Morris v. United States,* 326 F.2d 192 (9th Cir. 1963), condemned an instruction on inferring guilt from flight when no evidence showed the defendant to have fled, because the jury could interpret the instruction as

indicating flight had occurred. Likewise, the jury in the case at bar could interpret the entrapment instruction as Petitioner's admission of involvement.

The most significant conflict requiring resolution by this Court of the issue of whether or not a trial court may impose a defense upon a criminal Defendant which is inconsistent with and undermines the Defendant's own theory of defense, is presented by the statement of the Seventh Circuit Court of Appeals in *United States v. McCord,* 509 F.2d 891 (7th Cir. 1975). Therein the trial Court instructed on entrapment, a defense never raised by the Defendant. The Court noted that such instruction constituted error. It found the error to be harmless, however, since the Court's instruction did not include material indicating that for this defense that the Defendant admitted the acts alleged, nor did he state that entrapment was raised by Defendant in defense. The instruction was given in the context that even if the jury found Defendant to have engaged in the alleged act, he could not be guilty if a government agent had induced him to do so.

In the case at bar, the error is not harmless beyond a reasonable doubt. First, it followed immediately upon a less than clear intent instruction, further muddling the intent requirement in the juror's minds. Secondly, the body of the instruction referred to Petitioner's having committed the acts he denied committing. The Court's instruction included statements such as "induced . . . to commit a crime;" "to purchase narcotics from such suspected person;" "purpose to commit any offense of the character here charged, and *did so* only because he was induced or persuaded . . .;" "ready and willing to commit crimes such as charged in the indictment whenever opportunity was afforded." It is clear that the court implied that the Petitioner did the act charged,

and thus the jury was given an instruction which assumed the acts had occurred and that only a question of predisposition and inducement remained. Thirdly, and most prejudicial of all, the Trial Court did not present the defense as additional to the Defendant's own theory. Rather, it prefaced the entire instruction with a statement that

> "The Defendant asserts or indicates that he was a victim of entrapment as to the crime charged in the indictment." (Appendix E)

Thus, the jury was led to believe that Petitioner admitted that he did the acts but claimed he was entrapped, a clear misstatement actually contradictory to Petitioner's real defense. By stating Petitioner raised the defense, the Court attributed to him the necessary inference of admission of actions. The Seventh Circuit in *McCord* found no prejudice only because such an admission was *not* attributed to the Defendant therein. The presence of the attribution of a defense repudiated by Petitioner as undermining his actual defense by contradicting it clearly raises the admitted error to the ranks of the prejudicial, not harmless.

The Government's claim that Petitioner was merely afforded an inappropriate but additional defense, and thus no harm existed, is error. The very nature of this admittedly inappropriate defense contradicted Petitioner's position and actual defense. No serious argument can be made that the jury did not recognize the necessary implication that if Petitioner claimed entrapment he admitted participation. One cannot be entrapped without having fallen prey and performed the acts which would otherwise constitute a criminal offense. This inference undoubtedly colored the jury's deliberations, and denied Petitioner his *right to have his defense considered without implications undermining*

that position. Inapplicable instructions, even when not objected to, must be examined for possible prejudicial effect. *United States v. Naylor,* 566 F.2d 942 (5th Cir. 1978); the jury's reaction is important. The prejudicial effect of an instruction which requires a presumption of engaging in the activity which defendant's entire defense denies participating in, and where denial is the key jury issue, is clear. The jury's reaction requires reversal.

It is critical that this Court pronounce its judgment to prevent future trial courts from instructing juries in a manner contradicting a criminal Defendant's stance and thereby undermining the validity of the verdict.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

No. 77-5281

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD GILBERT SMITH,
Defendant-Appellant.

APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed August 11, 1978.

Before PHILLIPS, Chief Judge, MERRITT, Circuit Judge, and RUBIN, District Judge.*

RUBIN, District Judge. Donald Gilbert Smith appeals from conviction by a jury of a six count indictment, all relating to controlled substances. Count 1 of such indictment alleged a conspiracy in violation of 21 U.S.C. §§ 841 and 846. Counts II through VI charged substantive offenses of possession with intent to distribute, and distribution of controlled substances, in violation of 21 U.S.C. § 841(a)(1).

Appellant asserts six grounds for reversal of his conviction. Upon consideration thereof, the Court finds such grounds to be insufficient for reversal and does therefore affirm the conviction.

A proper understanding of the legal questions raised requires a review of the background in this matter. On Sep-

* Honorable Carl B. Rubin, United States District Court for the Southern District of Ohio, sitting by designation.

tember 26, 1974, appellant was indicted on a six-count indictment, the first count charging conspiracy in violation of 21 U.S.C. §§ 841 & 846, and the other five counts charging substantive offenses of possession with intent to distribute and distribution of controlled substances, in violation of 21 U.S.C. § 841(a)(1). On December 9, 1974, appellant entered a plea of guilty to Count VI. On February 12, 1975, the remaining five counts were dismissed. On the same day appellant was sentenced to a four-year prison term. Upon appeal, this Court vacated the guilty plea to Count VI and remanded the case to the trial court (*United States* v. *Donald Gilbert Smith*, No. 76-1560).

On January 19, 1977, a new indictment was filed, charging the defendant with the same six counts as contained in the previous indictment. On January 31, 1977, the original inditement was dismissed. On March 30, 1977, after a jury trial, appellant was found guilty on all six counts.

Appellant asserts the following grounds for reversal:

I. He was placed in double jeopardy as to Counts I – V by the filing of a second indictment;

II. The trial court's charge on intent was incorrect;

III. The trial court erred in charging on the defense of entrapment;

IV. He could not be prosecuted for both a conspiracy and substantive offenses;

V. Admission of tape recorded conversations and written transcripts was prejudicial, and;

VI. The evidence presented was insufficient to sustain a conviction.

I

DOUBLE JEOPARDY

Any discussion of the concept of double jeopardy must begin with the Fifth Amendment to the United States Constitution which provides in part as follows:

> . . .
>
> nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb. . . .

This concept has been described as:

> . . . deeply ingrained in at least the Anglo-American system of jurisprudence . . . that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent, he may be found guilty."

Green v. *United States*, 355 U.S. 184 (1957).

The Supreme Court has articulated the rule that jeopardy does not attach, and the Constitutional prohibition can have no application until a defendant is "put to trial before the trier of facts, whether the trier be a jury or a judge." *Serfass* v. *United States*, 420 U.S. 377 (1975); *United States* v. *Jorn*, 400 U.S. 470 (1971). In a jury trial jeopardy attaches when a jury is empanelled and sworn. *Downum* v. *United States*, 372 U.S. 734 (1963). In a non-jury trial jeopardy attaches when the Court begins to hear evidence. *Serfass* v. *United States, supra.*

Attachment of jeopardy, however, does not bar retrial upon a successful appeal from conviction, *Green* v. *United States, supra;* nor does it prevent the imposition of a more severe sen-

tence upon such retrial. *North Carolina* v. *Pearce*, 395 U.S. 711 (1969).

It is clear from an examination of the record herein that under the standards set forth by the Supreme Court, appellant has not been "twice put in jeopardy." At no time was he "put to trial before the trier of facts" on Counts I thru V of the indictment, and his trial upon Count VI followed vacation by this Court of his prior plea.

Appellant relies upon the decisions of this Court in *Rivers* v. *Lucas*, 477 F.2d 199 (6th Cir. 1973), *vacated on other grounds* 414 U.S. 896 (1973), and *Mullreed* v. *Kropp*, 425 F.2d 1095 (6th Cir. 1970), for the assertion that dismissal of counts of an indictment as the result of a plea bargain is equivalent to a jury's refusal to convict on those counts. *Price* v. *Georgia*, 398 U.S. 323 (1970). Appellant's reliance upon *Rivers* and *Mullreed* is misplaced. Those cases stand only for the proposition that the acceptance of a plea to a lesser included offense is a bar to subsequent prosecution on the more serious offense.

Mullreed dealt with a two count indictment in which both armed robbery and the lesser offense of unarmed robbery were charged in separate counts. *Rivers* dealt with a single count of murder. In each instance, however, the plea to the lesser offense, i.e. unarmed robbery in *Mullreed*, and manslaughter in *Rivers*, involved an offense necessarily subsumed in the more serious charge. Definitionally, armed robbery must also include unarmed robbery and murder must also include manslaughter.

This is simply not the situation in the case at bar. The conspiracy charged in Count I and the substantive offenses charged in Counts II thru VI are legally and factually distinct from each other, and appellant may be convicted and sentenced separately on each. *Iannelli* v. *United States*, 420 U.S. 770 (1975); *Blockburger* v. *United States*, 284 U.S. 299 (1932).

II

CHARGE ON INTENT

Appellant asserts that the following charge constituted prejudicial error:

> Intent is the purpose or aim or state of mind with which a person acts or fails to act. It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, in the absence of evidence in the case which leads the jury to a different or contrary conclusions, you may draw the inference and find that the accused intended such natural and probable consequences which one standing in like circumstances and possessing like knowledge should reasonably be expected to result from any act knowingly done or knowingly omitted by such person. (Tr. p. 957-958)

Appellant did not object to such charge as required by Rule 30 of the Federal Rules of Criminal Procedure. (Tr. p. 971)[1] Where there has been no timely objection, as contemplated by Rule 30, a reviewing court must limit its consideration to "plain error" as defined in Rule 52 of the Federal Rules of Criminal Procedure.

This charge has received a mixed reception in the federal courts. *United States* v. *Chiantese*, 560 F.2d 1244 (5th Cir. 1977); *United States* v. *Robinson*, 545 F.2d 301 (2d Cir. 1976); *United States* v. *Diggs*, 527 F.2d 509 (8th Cir. 1975); *Sherwin* v. *United States*, 320 F.2d 137 (9th Cir. 1963). We previously characterized the instruction as "clumsy" and "con-

[1] MR. GOLD:
. . . I have two specific objections, Your Honor, I would like to object to the Court's charge on the chain conspiracy, particularly the characterization aspects of it.
I would like to object to the Court's charge in regard to the entrapment, particularly in that the defendant has asserted no aspect of it.

fusing." *United States* v. *Releford*, 352 F.2d 36 (6th Cir. 1965); *United States* v. *Denton*, 336 F.2d 785 (6th Cir. 1964). The giving of such instruction, however, does not on this record constitute plain error. When the instructions are viewed in their entirety, the trial court's careful instructions regarding presumptions of innocence (TR. p. 934), a defendant's failure to testify (TR. p. 960), and the definitions of the terms wilfully, unlawfully and knowingly (TR. pp. 945 & 957-958), negate the argument that the intent instruction constituted prejudicial error. *United States* v. *Releford, supra; United States* v. *Denton, supra.*

III

INSTRUCTION ON ENTRAPMENT

During the defense's summation, the Court concluded that counsel's argument may have raised a question of entrapment. On page 913 of the transcript the following appears:

> THE COURT: Before we proceed, Mr. Michelson, there was an inference in your closing argument that raises a question of entrapment. The Court is required to charge on entrapment, so an appropriate charge has been inserted.[2]

The Court thereupon included in its charge to the jury a correct charge on the law of entrapment.[3]

[2] The colloquy appears to be confusing in that it could be interpreted that Mr. Michelson, Assistant United States Attorney, had raised the inference of entrapment. A careful reading of the Court's statement and the understanding that it occurred at the close of defense counsel's summation makes it obvious that the word "your" does not refer to Mr. Michelson, but rather to defense counsel Gold.

[3] "The defendant asserts or indicates that he was a victim of entrapment as to the crime charged in the indictment.

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is not entrapment. For example, when the Government suspects that a person is engaged in the illicit sale of narcotics, it is not entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.

If, then, the evidence in the case should leave you, the jury, with a reasonable doubt whether the defendant had the previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some officer or agent of the Government, then it is your duty to acquit him.

If, however, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offenses involved in this case, the defendant was ready and willing to commit crimes such as charged in the indictment whenever opportunity was afforded, and that Government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment."

Appellant does not contend that the charge as given was erroneous; he contends rather that any charge on entrapment might have led the jury to believe that he had committed the offenses with which he is charged.

It is well settled law that a jury charge must be considered in its entirety and not on a sentence-by-sentence basis. *Cupp* v. *Naughten*, 414 U.S. 141 (1973); *United States* v. *LaRiche*, 549 F.2d 1088 (6th Cir. 1977). Included in the Court's charge are the following:

> "The defendant denies every material aspect of the accusation and the charges against him." (TR. p. 934).
>
> "A defendant is never to be convicted on a mere suspicion or conjecture." (TR. p. 935).
>
> "The law never imposes upon the defendant in a criminal case the burden or duty of calling witnesses or producing evidence." (TR. p. 935).
>
> "The Government must prove all of the essential elements with respect to each of the counts beyond a reasonable doubt before a verdict of guilty may be returned with respect to that count." (TR. p. 938).

When the entrapment instruction is considered as part of the Court's complete instructions, it is difficult to find prejudice to the appellant. The last two paragraphs of the instruction are particularly significant. In each, the matter is addressed to the jury, based upon the jury's determination of what facts were proved. In the totality of circumstances of this case, the entrapment instruction did in fact permit appellant an additional defense without requiring him to admit his guilt to the offenses as required by *United States* v. *Henciar*, 568 F.2d 489 (6th Cir. 1977) and *United States* v. *Mitchell*, 514 F.2d 758 (6th Cir. 1975). Under such circumstances the instruction cannot be prejudicial. *Sylvia* v. *United States*, 312 F.2d 145 (1st Cir. 1963) *cert. den.* 374 U.S. 809; quoted with approval in *Ortega* v. *United States*, 348 F.2d 874 (9th Cir. 1965).

IV

OTHER ISSUES

Appellants assertions IV, V, and VI lack merit and may be disposed of summarily.

A defendant may be prosecuted for both a conspiracy and substantive offenses. *Iannelli* v. *United States, supra; Pereira* v. *United States*, 347 U.S. 1 (1954); *United States* v. *Shelton*, 573 F.2d 917 (6th Cir. 1978).

Admission of tape recorded conversations and written transcripts are not prejudicial error in this circuit. *United States* v. *Smith*, 537 F.2d 862 (6th Cir. 1976); *United States* v. *Vigi*, 363 F. Supp. 314, *aff'd* 515 F.2d 290 (6th Cir. 1975); *Osborn* v. *United States*, 350 F.2d 497 (6th Cir. 1965), *aff'd* 385 U.S. 323 (1966).

It is not the function of an appellate court to consider the weight of the evidence. It is clear upon an examination of the transcript that sufficient evidence to warrant jury verdicts of guilty was present in this matter.

V

While it has not been asserted as a ground of error, it should be noted that the previous remand of this Court on November 22, 1976, contained the following instruction:

> To vacate the sentence imposed, to set aside the plea of guilty entered by appellant as hereinabove set forth, and to permit him to enter a new plea to the within charge.

On December 29, 1976, the defendant's conviction and sentence were vacated.

Before a new plea was entered, the 1974 indictment was dismissed, and on January 31, 1977, a new indictment was returned to which appellant pleaded not guilty to all counts. Since appellant's sentence and plea were vacated and a new plea of not guilty to identical charges was entered, it is clear that the mandate of this Court was carried out.

The convictions are hereby AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	
	)	
v.	)	ORDER
	)	
DONALD GILBERT SMITH,	)	
	)	
Appellant.	)	

Before PHILLIPS, Chief Judge, MERRITT, Circuit Judge, and RUBIN, District Judge.*

No judge of the court in regular active duty having moved for rehearing en banc, the petition for rehearing has been assigned to the hearing panel for disposition.

Upon consideration, the court concludes that the petition for rehearing is without merit.

Accordingly, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court:

CLERK

*Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs	)	No. CR77-18
	)	
DONALD GILBERT SMITH	)	

On this 22nd day of April, 1977 came the attorney for the government and the defendant appeared in person and by Gerald S. Gold, counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offenses of having conspired to distribute controlled substances, in violation of Title 21, Sec. 841(a)(1), U.S.C., as charged in Count I of the Indictment, and of having possessed controlled substances with intent to distribute, in violation of Title 21, Sec. 846, U.S.C., as charged in Counts II, III, IV, V and VI of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS FURTHER ORDERED that the motion of the United States, filed herein on April 6, 1977, for sentencing under Title 21, Sec. 845, U.S.C. is hereby denied.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years on Count I, plus a special parole term of two (2) years pursuant to Title 21, Sec. 841b(1)(A), U.S.C.; two (2) years on Count II, plus a special parole term of two (2) years, to run consecutively to Count I; two (2) years on Count III, plus a special parole term of two (2) years, to run consecutively to the sentences imposed on Counts I and II; two (2) years on Count IV, plus a special parole term of two (2) years, to run consecutively to the sentences imposed on Counts I, II and III; two (2) years on Count V, plus a special parole term of two (2) years, to run consecutively to the sentences imposed on Counts I, II, III and IV; and four (4) years on Count VI, plus a special parole term of two (2) years, and a fine in the amount of Ten Thousand ($10,000.00) Dollars, to run consecutively to the sentences imposed on Counts I, II, III, IV and V.

IT IS FURTHER ORDERED that the fine imposed on Count VI shall be a committed fine, and the sentences of imprisonment and the special parole terms imposed shall run consecutively and not concurrently.

IT IS FURTHER ordered that execution of sentence herein is deferred to May 6, 1977 at 10:00 a.m. at which time defendant shall report to the U. S. Marshal to commence serving the sentence herein imposed, and that defendant's current bond remain in effect until that time.

IT IS FURTHER ORDERED that in the event that defendant files a timely notice of appeal, and posts a new, appeal bond in the amount of Thirty-five Thousand ($35,000.00) Dollars surety, he may thereafter remain at liberty on that bond during the pendency of the appeal.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the U. S. Marshal and that the copy serve as the commitment of the defendant.

/s/ Robert B. Krupansky

ROBERT B. KRUPANSKY
United States District Judge

APPENDIX D

May 23, 1978

Honorable Carl B. Rubin
United States District Judge
for the Southern District of Ohio
Cincinnati, Ohio 45202

Re: United States v. Donald Gilbert Smith, C.A., 6, No. 77-5281

Dear Judge Rubin:

Your recent letter to Assistant United States Attorney William Beyer regarding the above-captioned case has been referred to this office for response.

As you will recall, in response to the Court's questioning during oral argument of this case, both appellant's counsel and I indicated that there was nothing in defense counsel's closing argument at trial which raised the question of entrapment. A review of the record following my return from oral argument revealed nothing to alter my opinion as stated to the Court.

Since receiving your letter, I have re-examined the closing arguments of counsel. During his summation, defense counsel alluded to the fact that the Carrs (the government's primary witnesses) "felt that if they cooperated with the Government, it would go easier for them" (Tr. 887); that

appellant was "set[ ] up" by Kathy Carr (Tr. 892) and that "one of the dangers inherent in . . . the domino theory . . . where you get somebody—maybe its done through an informer—get somebody else. . . is that somebody, to protect himself and help himself, might do things that he shouldn't do" (Tr. 896). While these remarks might be construed as consistent with an entrapment defense when viewed in isolation, when placed in context the remarks were clearly part of appellant's defense that he had nothing to do with the narcotics transactions charged in the indictment and that Kathy Carr's testimony on this point was fabricated.

Consequently, we are again forced to reach the same conclusion—as we previously indicated both in our brief and at oral argument—that defense counsel's closing argument neither raised nor suggested the entrapment defense. Accordingly, we are at a loss to particularize the portions of the summation which prompted the trial judge to instruct on the question of entrapment. In addition, I have spoken to Mr. Donald Krosin, appellant's counsel, and he is in substantial agreement with our interpretation of the closing argument.

I hope that I have been of assistance in responding to your question regarding the trial court's entrapment instruction. If the Court has any further requests, please contact me at your convenience.

Sincerely,

ROBERT J. ERICKSON,
Attorney, Criminal Division
Department of Justice
Washington, D.C. 20530

cc:

Honorable Harry Phillips, Chief Judge
United States Court of Appeals
for the Sixth Circuit
Cincinnati, Ohio 45202

Honorable Gilbert S. Merritt, Judge
United States Court of Appeals
for the Sixth Circuit
Cincinnati, Ohio 45202

Donald N. Krosin, Esquire
Deputy Federal Public Defender
2015 Superior Building
Cleveland, Ohio 44114

APPENDIX E

"Intent" is the purpose or aim or state of mind with which a person acts or fails to act. It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, in the absence of evidence in the case which leads the jury to a different or contrary conclusion, you may draw the inference and find that the accused intended such natural and probable consequences which one standing in like circumstances, and possessing like knowledge should reasonably be expected to result from any act knowingly done or knowingly omitted, by such person.

Intent may be proved by indirect or circumstantial evidence. Indeed, it can rarely be established by any other means. While witnesses may see and hear, and so be able to give direct evidence of what a person does, or fails to do, of course, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a person does, or fails to do, may indicate either intent, or lack of intent to act, or to fail to act.

The burden is upon the Government to prove both the act coupled with knowledge and intent beyond a reasonable doubt. In determining any issue involving intent, the jury may consider all the facts and circumstances and evidence in the case, which may aid determination of the state of mind.

The defendant asserts or indicates that he was a victim of entrapment as to the crime charged in the indictment.

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is not entrapment. For example, when the Government suspects that a person is engaged in the illicit sale of narcotics, it is not entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.

If, then, the evidence in the case should leave you, the jury, with a reasonable doubt whether the defendant had the previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some officer or agent of the Government, then it is your duty to acquit him.

If, however, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offenses involved in this case, the defendant was ready and willing to commit crimes such as charged in the indictment whenever opportunity was afforded, and that Government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.

APPENDIX F

NO. 76-1560

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONALD GILBERT SMITH)
Petitioner)

vs.) ORDER

UNITED STATES OF AMERICA)

Respondent)

BEFORE: EDWARDS, PECK and McCREE, Circuit Judges.

This appeal, perfected from an order of the District Court denying petitioner-appellant's motion to vacate sentence and plea and to allow him to plead anew pursuant to 28 U.S.C. §2255, has been submitted for consideration pursuant to Rule 3(e), Rules of the Sixth Circuit. The Court being fully advised in the premises concludes that the District Court did not comply with Rule 11(d), Federal Rules of Criminal Procedure, before receiving petitioner's plea of guilty to a charge of possession with intent to distribute a controlled substance in violation of 21 U.S.C. §841(a)(1), in that while the district judge properly advised that the maximum committed sentence could not exceed five years, the district judge

did not inform him of the mandatory special parole term required to be imposed pursuant to 21 U.S.C. §841(b)(1)(B). Therefore,

IT IS ORDERED that this cause be and it hereby is remanded to the District Court with instructions to vacate the sentence imposed, to set aside the plea of guilty entered by appellant as hereinabove set forth, and to permit him to enter a new plea to the within charge.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
John P. Hehman, Clerk of Court